80-1021

Supreme Court, U.S.
FILED
DEC 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

MICHAEL R. WOOD,

Petitioner,

-vs-

FIVE POINTS SHOPPING CENTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL R. WOOD
1266 Coast Village Road
Santa Barbara, CA 93108
[805] 969-5935

Counsel for Petitioner
Pro Se

QUESTION PRESENTED

1. Is a case indistinguishable from Thermtron Products, Inc. v Hermansdorfer, 423 U.S. 336, where a district judge remanded on a ground he had no authority to consider, viz., the crowded condition of the federal docket?

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IN THE

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FIVE POINTS SHOPPING CENTER,

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PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

The petitioner Michael R. Wood respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 16, 1980.

OPINION BELOW

The opinion of the Court of Appeals, not reported, appears in the Appendix hereto. The final order of remand was rendered by the District Court for the Central District of California, and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 16, 1980. A timely petition for rehearing was denied on September 19, 1980, and this petition for certiorari was filed

within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Is a case indistinguishable from Thermtron Products, Inc. v Hermansdorfer, 423 U.S. 336, where a district judge remanded on a ground he had no authority to consider, viz., the crowded condition of the federal docket?

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. §1441(a) provides that unless otherwise expressly provided by Act of Congress, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," may be removed by the defendant to the district court of the United States.

Section 1446 provides the procedure for removal, and a case removed under that

section may be remanded only in accordance with §1447 which governs procedure after removal. Section 1447(c) provides in part:

> If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.

Section 1447(d) generally forbids review of remand orders:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State from which it is removed pursuant to section 1443 of this title shall be reviewable on appeal or otherwise.

It is unquestioned in this case and conceded by the petitioner that this section prohibits review of all remand orders issued

pursuant to §1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ.

STATEMENT OF THE CASE

The sole issue here is whether §1447(d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by §1447(c). The District Court did not purport to proceed on the basis that this case had been removed "improvidently and without jurisdiction." Neither the propriety of the removal nor the jurisdiction of the court was questioned by the judge in the slightest. Section 1447(c) was not even mentioned. Instead, the District Court's order was based on grounds wholly different from those upon which §1447(c) permits remand. The transcript of the hearing shows that the judge remanded the case because "This court is not disposed to try an unlawful detainer case" [Tr. 8/18/80,

p. 6, line 25; p. 7, line 1]. This consideration, however, is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under §1441, and hence to the question whether this cause was removed "improvidently and without jurisdiction" within the meaning of the statute.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN REMANDING ON GROUNDS NOT PERMITTED BY THE CONTROLLING STATUTE.

Although the Court of Appeals erroneously held that the District Court had jurisdiction to enter its remand order, the Court of Appeals did not mention §1447(c), did not suggest that the District Court had proceeded under that section, properly or

improperly, and did not itself suggest that this case was not removable under §1441 or that it had been improvidently removed from the State court for want of jurisdiction or otherwise. In the face of petitioner's position that the remand was for reasons not authorized by the statute, the Court of Appeals acted solely on the ground that under §1447(d) it had no jurisdiction to entertain a petition for writ of mandamus challenging the remand order issued by the District Court in this case.

But §1447(d) does not prevent review of remand orders in and of itself. That section and §1447(c) must be read together. These provisions are in pari materia and must be construed with reference to each other.

The district judge's inclination not to try an unlawful detainer case is a ground wholly different and plainly irrelevant to the provisions of §1447(c). Therefore, the

remand was unauthorized under Thermtron Products, Inc. v Hermansdorfer, 423 U.S. 336.

2. THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT CONCLUSIVELY DEPRIVED THE PETITIONER OF ANY REMEDY, WHATSOEVER, AND TOTALLY FAILED TO RESOLVE THE RECURRING ARGUMENT OF WHETHER A DISTRICT COURT JUDGE IS CONSTRAINED TO RETAIN JURISDICTION OVER DIVERSITY ACTIONS, PROPERLY REMOVED, AND FORBIDDEN TO ARBITRARILY REMAND SUCH ACTIONS UPON PURELY DISCRETIONARY GROUNDS, OTHER THAN NON-WAIVABLE JURISDICTIONAL DEFECTS, WHICH RECURRING ARGUMENT GREATLY AFFECTS FEDERAL JURISDICTION IN THE DISTRICT COURTS.

Petitioner, as admitted by the respondent herein, properly removed this action in strict compliance with all statutory and

jurisdictional requirements. Respondent arbitrarily remanded the action upon purely discretionary grounds, after having previously properly assumed and exercised jurisdiction. The refusal of the Circuit Court of Appeals for the Ninth Circuit to accept jurisdiction and determine the issue involved herein granted continued and unlimited discretion to the respondent and other District Court judges to remand cases, even though properly removed, as they see fit. In so doing, the Circuit Court of Appeals for the Ninth Circuit has also prevented this petitioner from obtaining any review, whatsoever, of the purely discretionary decision of the respondent. The denial of review to this petitioner is unconscionable. Furthermore, to permit such unbridled discretion would certainly have considerable impact upon federal jurisdiction, not only within the Ninth Circuit, but throughout the nation.

The argument pronounced in judicial decree by the respondent has recurred in various courts; however, that contention has been consistently rejected.

In Romero v. ITE Imperial Corporations, 332 F.Supp. 523 (D.C.P.R. 1971), a timely petition for removal was filed on January 19, 1971. On July 7, 1971, the plaintiff filed a motion to remand based upon the grounds that a remand would speed up the proceedings and would therefore be in the interest of justice. The court stated, at page 526, as follows:

> "The right to remove an action from a state court to the Federal District Court is a statutory right and it is a right that has existed since the original Judiciary Act of 1789. (Citations omitted.) 'The whittling away or surrender of diversity jurisdiction, or of any other part of the Federal

jurisdiction which serves a legitimate function under the Constitution, only weakens the federal system under which we have long prospered and, with fair success, have done justice between disputants.' (Citation omitted.)

"Plaintiff's argument to the effect that a remand would speed up the proceedings in this case and would therefore be in the interest of justice is not correct . . . Once the statutory requirements for the right of removal have been met, this court cannot order a remand on discretionary grounds such as the alleged speedier trial to be afforded the plaintiff." (Emphasis added.)

In Vann v Jackson, 165 F. Supp. 377 (E.D.N.C. 1958), the court addressed the issue of discretionary authority to remand,

at pages 380-381, as follows:

> "(T)he proposition has been advanced that the court has discretionary power to remand this case to the state court, even though properly removed to the federal court. In considering this question, the court must exercise care to determine that a discretionary power does exist, and that it will be in the interest of justice to exercise such discretion.
>
> * * * Since there is no means for reviewing an order remanding a case to a state court, the court should act with caution in determining whether or not a power to remand exists. (Citation omitted.) The court is without power to remand if no discretionary power exists.

* * * It is concluded that where congress has provided both a state and a federal forum, and has further provided for actions first brought in the state court to be removed to the federal court, no discretionary power exists to remand the case to the state court." (Emphasis added.)

In Asbrandtsen v District 2, Marine Engineers Beneficial Association, AFL-CIO, 256 F.Supp. 68 (E.D.N.Y. 1966), the District Judge gave short shrift to the argument that despite the court's jurisdiction, that it had discretion to remand, at page 77, as follows:

"The Union urges the court to remand to the state court despite a finding that it has jurisdiction. It advances a most unusual argument. It agrees that, regardless of the forum, federal law should and will be applied . . . It assumes that despite a finding of

federal court jurisdiction, this court has the discretionary power to remand and reminds the court that, should it remand, its order would not be subject to review . . . Having jurisdiction, this court in my view, has no discretionary power to remand in a case such as this which does not call for the application of the doctrine of abstention. Even if there were such a discretionary power, the court would not exercise it in favor of a remand."

In Davis v Joyner, 240 F.Supp. 689 (E.D.N.C. 1964), the identical question presented in the case of Vann v Jackson, supra, and Larkin v Roseberry, 54 F.Supp. 373 (E.D. Ky. 1944), was presented to the court. The court, therein, stated, at page 691, that the court's authority to remand is found in Title 28 U.S.C. §1447(c) and provides that the District Court shall

remand if "it appears that the case was removed improvidently and without jurisdiction." It was held that this was certainly not the case, in the instant action.

The statutory right of removal is a valuable right which must be protected by the District Courts. Home Insurance Co. v Morse, 20 Wall 445, 22 L. Ed. 365 (1874); Muller v Lyke Coastwise Line, 144 F. Supp. 135 (S.D. Tex. 1940); and Gentle v Lamb-Weston, Inc., 302 F.Supp. 161 (N.D. Maine 1969). Thus, when a District Court is presented with an action of which it has cognizance, it may not turn the matter over for adjudication to the state court. Mach-Tronics, Incorporated v Zirpoli, 316 F.2d 820 (9th Cir. 1963).

It is readily apparent that the recurring argument, propounded by litigants in favor of granting discretionary power to remand, has been consistently rejected by District Court judges. Respondent is

apparently the first District Court judge to actually infer such discretionary power, sua sponte, to remand or infer such discretionary power from the statutory provisions, where such discretion is not founded upon any legal basis or jurisdictional basis but solely upon discretionary considerations. Such discretion cannot be justified. Only if an action is removed "improvidently," which means "wrongfully or without legal basis," and if the District Court is without jurisdiction can a case be remanded. Harlan Laboratory v Topp's Chewing Gum, 131 F.Supp 262, 267 (E.D.N.Y. 1955). Of course, in those cases removed improvidently and without jurisdiction, the judicial discretion exercised is based upon legal conclusions and not discretionary considerations. Such is certainly not the instant case.

It is, therefore, submitted that this petitioner be afforded at least a review of

the discretionary decisions below. "Remedies for rights are ever favorably extended." 18 Vin. Abr. 521.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

MICHAEL R. WOOD
1266 Coast Village Rd.
Santa Barbara, CA 93108
[805] 969-5935

Counsel for Petitioner
Pro Se

Appendices

APPENDIX A

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

MICHAEL R. WOOD,

Petitioner,

-vs-

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

FIVE POINTS SHOPPING CENTER, a Limited Partnership (fictitious name), succeeded by MacDONALD GROUP, LTD., a Nevada Corporation,

Real Parties in Interest.

FILED
SEPTEMBER 16, 1980
RICHARD H. DEAN
CLERK, U.S. COURT OF APPEALS

NO. 80-7493

D.C. #80-02691-WPG
CENTRAL CALIFORNIA

ORDER

Before: Poole & Norris, Circuit Judges.

Upon due consideration, the petition for

writ of mandate has been denied.

An order remanding action to the state court is only reviewable under a very narrow exception to 28 USC §1447(d). See Thermtron Products v Hermansdorfer doctrine 423 USC 336.

Based upon the materials submitted to this court, district courts order of remand does not appear to fall within that exception.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL R. WOOD,

Petitioner,

-vs-

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

FIVE POINTS SHOPPING CENTER, a Limited Partnership (fictitious name), succeeded by MacDonald GROUP, LTD., a Nevada corporation,

Real Parties in Interest.

FILED
SEPTEMBER 19, 1980
RICHARD H. DEAN
CLERK, U.S. COURT OF APPEALS

NO. 80-7504

ORDER

Before: POOLE and NORRIS, Circuit Judges.

Upon due consideration, Michael R. Wood's

second petition for writ of mandamus is denied for the same reasons that his first petition, No. 80-7493, was denied. The court will not entertain any further petitions to review the district court's order of remand.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

FIVE POINTS SHOPPING CENTER, a Limited Partnership (fictitious name), succeeded by MacDonald Group, Ltd., a Nevada Corporation,

Plaintiff,

-vs-

MICHAEL R. WOOD, GEORGE R. WOOD, and DOES II through XX, inclusive,

Defendants.

FILED
AUGUST 18, 1980
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. 80 02691 WPG

ORDER REMANDING TO STATE COURT

The Motion of Plaintiff to remand the above entitled cause to the Superior Court of the State of California, in and for the County of Santa Barbara, having been argued, heard and considered, it is

ORDERED that the Motion be granted and that this cause is hereby remanded to the Superior Court of the State of California, in and for the County of Santa Barbara, for further proceedings.

IT IS FURTHER ORDERED by this Court that the Plaintiff have and recover from Defendants its costs incurred in this Court and attorney's fees in the amount of _____ for which execution is awarded.

DATED: August 18, 1980

/s/ WILLIAM P. GRAY
U.S. DISTRICT JUDGE